



State & Federal Contractors Water Agency

1121 L Street, Suite 802, Sacramento, CA 95814

August 3, 2010

Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Re: Specific Comments, Second Draft Interim Plan

Dear Chairman Isenberg and Council Members:

SFCWA appreciates the opportunity to provide further comments on the 2nd Draft Interim Plan (IP). We reiterate by reference the general comments we provided in our July 19, 2010 letter (attached), particularly the concern that the IP must meet the legislative direction to provide "recommendations for early actions, projects and programs" (section 85084), and not just propose a "framework" for further process to develop such recommendations. The following specific comments are broken into two sections: (1) language or clarity problems with policy implications that we believe should be revised; and (2) general editorial comments.

SUGGESTED EDITS RELATING TO POLICY QUESTIONS AND CONCERNS

p. iv, lines 37-39: document says the Council will give highest priority to "issues that require action" which should be at least coupled with, if not replaced by, recommendations for actual "early actions, projects and programs" as directed by the Act. This is a general concern with the document as a whole and we concur with Vice-Chair Fiorini's direction that the next draft should include a list of actual proposed early actions.

p. v, line 2, line 4, lines 5-6: The IP must be more than a "framework" for outlining "processes" to develop "recommendations for early actions, projects and programs." It must also be, at a minimum, an actual ACTION plan.

p. vii, lines 15-17: Any description of the "use" of "Delta water flows" needs to be revised to explicitly state how the Council sees such "use" in its process and under what authorities etc. Generally, we do not believe this issue is within the purview of the Council and should be deferred to the SWRCB's water quality control planning and water rights processes. This is particularly the case with respect to the recent SWRCB flow criteria report related to protecting public trust resources. We do not agree with the Chairman's assertion at the July 23rd meeting that the SWRCB flow criteria are within the Council's jurisdiction. In any case, as stated above the IP must clearly

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explain and substantiate just how the Council's use of Delta water flows would be reflected in the Council's work and development of the Delta Plan.

p. vii, lines 18-25: The discussion of the use of the CALFED ERP for purposes of the IP should include the need to consider/coordinate with the BDCP Conservation Strategies and that the Delta Plan will incorporate the BDCP itself which, along with the County HCPs, will encompass the breadth and scope of appropriate in-Delta ecosystem restoration efforts.

p. viii, line 13: The statement that the "seven tools focus on core responsibilities of the Council" overstates the Council's role vis-à-vis Delta water flows and the Ecosystem Restoration Plan. These are within the purview of the SWRCB and the BDCP (with the County HCPs) respectively. We do suggest adding as a separate item/"tool" an Emergency Response Preparation and Coordination section.

p. 1, line 24: The Delta is not the "source" of drinking water as described in the draft. We refer you to our comments on this issue in response to the first draft and in our general comment letter on this draft.

p. 1, line 34: replace "are not" with "have not been". All the cited laws may in fact provide effective protection if they were actually enforced more uniformly, particularly with regard to removing or reducing "other stressors". To make a conclusory statement such as "are not" falls into the category of "asserting facts not in evidence".

p. 1, line 35: just as it is incorrect to say the Delta is the "source" of water for the export projects, it is also incorrect to say there are "exports through the Delta". Water, diverted in the Sierra Nevada, flows across the Delta to the project pumps. It would be more accurate to say "project pumps in the south Delta export water that has been conveyed across the Delta." or something like that.

p. 2, lines 6-7: instead of "more water must be conserved" it would be more encompassing and accurate to say "water must be used more efficiently" which includes conservation but also many other activities to stretch supplies. On line 7 substitute "ameliorate" for "address" since conservation is not really a strategy to reduce shortages themselves but a way to reduce the impacts of shortages. Insert "improve flexibility in managing" between "and" and "the Delta" as the ability to better manage for the coequal goals will result from being able to better buffer against and manage for shortages through improved WUE. It is also important to articulate that water conserved won't "address" the Delta ecosystem directly, rather than perpetuate the false presumption that it will.

p.2, line 12, line 15: use of the word "Compounds" is confusing in that it can mean so many things. Would "compounds" include sediment? Is it natural substances like mercury or chemical pollutants that result from human activity only? Perhaps there's a more accurate and encompassing word for the point being made.

p.2, lines 38-39: echoing our comment on the first draft that included this statement, the notion that climate change "will require additional flows to be released from reservoirs to maintain water quality for the ecosystem" presumes conditions and ongoing regulatory standards that are unknowable at this time and ignores other measures that can, and are required by the Delta Reform

Act to, be taken to maintain water quality to protect beneficial uses. Instead of “require additional flows” we suggest using “will likely require changes to the regulatory and operating criteria for terminal reservoirs in the Delta watershed.”

p.3, lines 36-37: use of “historically high levels of water export...in the last two decades” is questionable and could be read as implicating some level of imbalance in the overall management scheme in the Delta. This statement discounts the fact that all regulatory requirements were being satisfied, historic wet years occurred during this time period, and the Environmental Water Account was implemented to allow for increased exports at certain times while providing protection for fisheries at others, etc. In the context of the paragraph, it would be more appropriate and accurate to simply use “operations of the major South Delta pumps” as one of the causes “in some combination”.

p.5, lines 4-11: This entire paragraph is superfluous and too simplistic to boot. It should be deleted. To say improved conveyance between the Sacramento and San Joaquin rivers is confusing. Water is not being conveyed to supplement the San Joaquin River, it is being conveyed to the SWP/CVP project facilities. Also, the original plans for the SWP (which became the CVP) in the early decades of the 20th century included a conveyance facility like a “peripheral canal” as a key component of the overall infrastructure. It didn’t first appear in the 1950s or 1960s as this language implies.

p.5, line 12-13: The first sentence implies that there are no anadromous “attraction” flows today, that is not the case and the sentence should be revised. We suggest, “Some development of water resources facilities to improve water conservation and flood management have partially modulated downstream flows during storm events that cue or attract upstream migration by anadromous fish.” Also, substitute “provide” for “provided” on line 13.

p.5, lines 23-24: assertion that X2 is “to be protective of the ecosystem” is subject to debate and here it’s stated as fact. We suggest simply substituting “to meet regulatory requirements” for all the verbiage in the sentence after “Delta”.

p.5, lines 28-30: the ability to repair massive levee failure and the need to use reservoir releases to reverse saltwater intrusion are both dependent upon where and when such a failure would occur, the water year type, etc, etc. While the sentence does say “could” it reads as more definitive than the assertions really should be considered.

p.12, lines 16-27: This paragraph should be modified (or the report should add a separate section) by adding reference to actual early actions that the Council will recommend rather than repeating the notion of the IP being a “framework” for developing recommendations. As noted, some “early actions” were expressly identified and delegated to other agencies in the Act, however, there are areas where the Council could provide recommendations on early actions that are not being pursued by others but should be, e.g. reducing other stressor impacts etc.

p.12, line 35: the statement that the “Council work on ‘early actions’ will appropriately continue under the framework of the Interim Plan” should be revised so that the “early action” recommendations/activities of the Council aren’t described as needing to “wait” for anything.

p.13, lines 2-7: The delineated sections of the “Plan” are incomplete because of the conspicuous absence of a section setting forth actual “actions” to be recommended. “Tools for Action” are not the same as “action” as the Act calls for.

p.13, lines 16-17 and 20-21: Both of these paragraphs should add that these are “illustrative only” since until they’re actually revised and provided as proposals there should be no confusion as to their being only placeholders and not actual proposals.

p.15, Framework for Early Actions section. This section needs to be revised to reflect Vice-Chair Fiorini’s direction, concurred with by the Council, that actual early actions and categories of actions be listed in addition to the discussion of the so-called “framework” for developing recommendations for other early actions, projects and programs. The Council and the IP should be more concerned with early actions it can promote that aren’t already being carried out and less concerned with those that have been delegated to others in the Act.

p.15, lines 15-28: These first two bullets related to “Delta flows” and the responsibilities of the Department of Water Resources should not be included in the IP as they are actions of other agencies and outside the purview of the Council. The Council should limit itself to monitoring progress on these fronts and receiving informational updates as appropriate.

p.15, lines 29-36: These three bullets are within the purview of the Council but should not be included in the IP but are rather they are activities that will properly occur as part of the Delta Plan development.

p. 16, lines 11-12: With respect to the reference to the Council’s potential appellate role regarding DFG’s BDCP determinations, we submitted separate detailed comments on this issue in a July 28, 2010 letter, which we incorporate here by reference. While the comments were specifically responding to Sections 23-25 within the Council’s proposed procedures described in Appendix, Section 3, we believe they are applicable to the IP generally as well.

p.16, lines 25-26: The statement that the Council in the Delta Plan “will identify and select among alternative actions to satisfy requirements of the [Act]” raises the question of how the Council sees itself as an implementing agency rather than developing a plan that others will implement with monitoring by the Council. We believe more clarity on this point is necessary to allow more effective dialogue with state/federal agencies and the stakeholder community.

p.16, lines 27-28: While a process for amending the Delta Plan makes sense to consider, the short timeframe of the Interim Plan makes amendment and any discussion of a process to do so superfluous. The Delta Plan will reflect any needed changes to the IP. This seems like process for the sake of process rather than need.

p.22, line 19: insert “rigorous” between “undergone” and “peer review”. The term “rigorous” is an important qualifier because too often ostensible peer review can be poorly done and really only perfunctory, while still being deemed “peer reviewed”. That should be avoided. In addition, the word “rigorous” appears in the Sullivan article; “Defining and Implementing Best Available Science for Fisheries and Environmental Science, Policy, and Management”, cited in footnote 9.

p.22, line 20: add “...applicable field(s) of study, where results of that peer review are transparent to stakeholders.” This transparency is critical to ensuring as broad an acceptance of the results of the analyses as possible.

p.23, lines 1-7: We suggest the follow changes to emphasize that the Independent Science Board and the Delta Science Program will be central to the Council’s process for assessing and determining which science is the “best”. Building the credibility of monitoring protocols, the validity of the information gleaned from that monitoring, the assessment of it, and the resulting conclusions informing policy choices must be improved over the present situation. “The Council will ~~draw~~ rely heavily upon the Delta Independent Science Board and the Delta Science Program ~~scientists and experts~~ in determining the relevance, value, and reliability of the best available science and in organizing that information for use in its decisions, ~~relying heavily on the Delta Science Program and the Delta Independent Science Board.~~ The Council has the final responsibility in determining the best available science, including when a choice among competing interpretations of available science must be made.

Best available science is specific to a decision context and ~~the best available science will thus be defined by~~ necessarily reflect the specific decision to be made and the time frame available for that decision.”

[Note: We also refer you to definitions which exist in federal regulation. Under the regulations related to the Information Quality Act and activities of the Council on Environmental Quality guidance on best available science has been adopted, which would likely be informative and could help ensure consistency.]

p. 23, lines 3-5: The statement that the “Council has the final responsibility in determining the best available science” could be misconstrued to imply that such a Council determination would be binding on other regulatory processes. As the Council recognizes several places in the IP, the savings clauses in the Reform Act preserving the existing authority of SWRCB, DFG and other regulatory agencies and processes have not been amended by the legislation. This statement should be qualified to recognize limitations on the Council’s authority with respect to determinations currently within the discretion of other agencies under existing law regarding best available science.

p.23, line 11: insert “conceptual models,” between “statements of” and “assumptions”. Conceptual models are similarly critical inputs to the development of Delta science and policy as the other categories listed.

p.24, lines 9-12: We request that section 85057(b)(1) be added to the list of broad exclusions listed in the IP (and the Delta Plan).

p.27, lines 11-12, 17-18: The “tools” 2 and 3 are not within the purview of the Council to engage on as they have been delegated to the SWRCB and BDCP (combined with the Delta Counties’ HCPs) and thus are also not “core responsibilities” of the Council. It is still unclear how the Council sees the information developed under “tools” 2 and 3 would “be required for decision making”. This should be more clearly and explicitly explained and expanded upon.

p.28, line 32: It is unclear what the Council's role and expectations are with regard to the statement that SWRCB and DFG flow criteria "will be one of the early considerations of Delta water flow." Consideration by the Council? For what purpose? To what end? How will the "consideration" be carried out? Etc. We reiterate our view that issues related to the regulation of Delta flows are beyond the purview of the Council.

p.29, line 14: change the opening to "All uses of ~~the~~ Delta lands require..." As written the implication is aquatic ecosystem services of the Delta are somehow benefited by "a certain level of flood protection." The reality is just the opposite - aquatic resources would be far better served by broad land/water interfaces, which was a significant conclusion of the Delta Vision process and is an important component of the Bay-Delta Conservation Plan strategy.

p.29, lines 15-16: While the concept of ensuring "congruence" between the level of protection provided by particular levees and what is being protected is an important one, the IP needs to get more specific and begin moving that ball down the road. The IP needs to lay the foundation for levee prioritization and set forth a process and timeline to achieve this goal sooner rather than later. This is an issue the Council was specifically established to exercise leadership on (see the Act, sections 85305(a) and 85306) and it should do so as part of its "recommendations for early actions, projects and programs" in the IP.

p.38, line 11: While it is true that the recommendations of the Delta Vision Strategic Plan AND the Delta Committee's Implementation Report (the latter is conspicuously absent from the Council's documents though the Act includes it on a par with the DVSP) are required to be "considered", the use of "must" in the context of this sentence implies that they must be included in the plan itself when the Act is permissive on this point and explicitly states that while the DVSP and DCIR must be considered, their recommendations "may" be included or not. We suggest inserting "but not necessarily included" between "considered" and "in developing the Delta Plan."

Appendix A (A) 1, p.2, lines 1-7: The Council should consider whether a majority of those present or a majority of the Council is necessary to take an action or perhaps a certain category of action. Under this proposed quorum and voting rule, 3 votes could be determinative rather than 4. The Council should consider whether it wants to require 4 votes to move items or specific categories of items.

A1, p.2, line 30: document should be clear (or add) that in addition to a member of the Council being able to remove an item from the consent calendar, a member of the public may request the same as well.

A1, p5, lines 22-27: Requires that an agency submitting a consistency certification must first take and include in it its submission public comments. While we agree public participation will be key in implementation of the Delta Plan, we are unaware of any authority in the Reform Act for the Council to require this additional step unless it is already required by existing law with respect to the agency submitting the certification. In conformance with the savings clauses in the legislation, this statement should be revised to require the public agency to include public comment to the extent consistent with existing law with respect to that agency.

A1, p. 5, lines 40-45: This section authorizes the Council itself to appeal a consistency certification. This authority does not appear anywhere in the Reform Act. Moreover, we believe it is procedurally inappropriate for the entity authorized to decide an appeal to itself raise the appeal. Finally, allowing the Council to decide itself whether to review a decision made by the agency is inconsistent with the compromise reached in the legislation between giving the Council direct approval authority and limiting its authority only to review of a certification that has been questioned by a third party.

A1, p. 6, lines 31-40: In addition to the conditions specified in this section for an appellant to augment the record, the Council should require the appellant to have attempted to submit the additional information to the agency during its process.

A1, p.7, line 11: The appeal is required to be heard on the record before the agency. That requirement precludes “testimony” in the appeal process. The more appropriate phrase to use here would be “Any interested person may ~~testify~~ comment before the council.”

A1, p. 8-9: Our letter to the Council dated July 28, 2010 discussed in detail the Council’s role and authority in determining whether the BDCP should be included in the Delta Plan, and in particular the Council’s authority, if any, to overturn DFG’s determination. We again refer you to those comments here. In particular, however, we must point out that the proposed adoption of the “independent judgment” standard is completely unjustified. That standard is not authorized in the Reform Act; violates the Act’s savings clauses; violates the existing legal standards regarding review of administrative agency decisions; and is inconsistent with the substantial judgment standard specified in the legislation for consistency certification appeals.

A4, p. 4, line15: The Council here incorrectly refers to the Legislature’s “water use reduction targets” by the omitting the term “per capita” before reduction, although it does correctly include that term in its summary of the statute on line 18.

A4, p.7, lines 30-32: Whenever citing policy of section 85321 please quote the key sentence in its entirety, or at a minimum always recite the clauses that include “future” and “statewide” in them.

A5, line 15 through the end: This “illustrative only” appendix should be eliminated from line 11 until the end and replaced with either categories only or nothing at this time. The repetitive listing of the Delta Vision recommendations, many of which were explicitly rejected by the Implementation Plan and/or superseded by the Delta Reform Act only adds confusion rather than clarity.

EDITORIAL COMMENTS AND SUGGESTIONS

p. iv, line 26: delete “in the future” – redundant.

p. vi, line 28, line 31: missing periods at end of statements.

p. vi, line 37: insert “(described below)” after “tools”.

p. vii, line 4: missing period at end of statement.

p. 1, line 21: add “and nation” after “state”.

p.2, line 11: substitute “geometry” for “formation”.

p.2, lines 19-24: this paragraph doesn’t seem to add anything and seems dropped-in. Suggest deleting it.

p.3, line 3: Suggest substituting the word “demand” for the second “use” since we know we have a statute in place that per capita water use be reduced by 20% by 2020.

p.4, line 42: The Delta doesn’t provide “drinking water supplies to more than 25 million California residents.” This is the same problem as using the word “source”.

p.5, line 15: delete the 2nd “the”.

p.5, line 26: substitute “likelihood” for “presence”.

p.5, line 32-33: “...and new water conveyance around the Delta facilities would provide...” Also, at end of line 33, “...for the ecosystem management...”

p.5, line 40: “...~~the Delta water supplies are~~ conveyance was disrupted.”

p.6, line 4: replace “from” with “to respond to”.

p.7, line 12: “...was partially a response...”

p.7, line 13: “Among ~~the~~ major assessments of these ~~the~~ weaknesses...”

p.7, line 14: insert “the” before “Delta Vision Strategic Plan”. Also, whenever mention the DVSP the document should also reference the Implementation Report from the Delta Committee, per the definition in the Act.

p.7, line 30: insert “being” between “are” and “initiated”.

p.8, line 3: insert “(described above)” after “challenges”.

p.8, line 12: insert “use” between “water” and “efficiency”.

p.8, line 41: The 2005 Water Plan wasn’t actually produced/finalized until 2008 or something if I recall correctly. Should indicate when it was actually published as a final document rather than just using the 2005 date.

p.9, line 3: insert “SWRCB’s” between “The” and “Water”.

p.11, line 2: add “and Other Policies” after “Goals”.

p.12, line 33: “...this Interim Plan is intended to informs the actions...”

p.13, line 13: "...in regard to review ~~approval~~ of the Delta economic sustainability plan ~~of the Delta~~ prepared..."

p.17, line 3: "processes" for "process".

p.22, line 8: missing period at the end.

p.22, line 11: missing period at the end.

p.24, line 2: insert "as" between "actions" and "a".

Appendix (A) 1, p.1, lines 16-19: The Council has decided to change the location of its regular meetings to the West Sacramento City Hall, which should be reflected here.

A1, p.8, lines 2: add "and the BDCP EIR" after "(BDCP)"; change "meets" to "meet".

A1, p.8, line 3: add "EIR" after "BDCP" and "NCCP certification" between "its" and "determination".

A1, p.9, lines 14-17: Delete 2nd sentence of this section.

A4, p.3, line 32: replace "may" with "shall"; delete words after "Plan".

A5, p.1, line 4-5: Here again there is only mention of the DVSP without including the Delta Committee's Implementation Report which is included in the Act as required for consideration, but the recommendations of which, like those of the DVSP "may" be included in the Delta Plan. The DCIR should be referenced whenever the DVSP is.

Thank you for your consideration.

Byron Buck
Executive Director

A handwritten signature in black ink, appearing to read "Byron Buck", with a stylized, flowing script.

Byron M. Buck
Executive Director



State & Federal Contractors Water Agency

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July 28, 2010

Chairman Philip Isenberg and Council Members
Delta Stewardship Council
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Dear Chairman Isenberg and Council Members:

As you know, last year member agency representatives of the State and Federal Contractors Water Agency ("SFCWA")¹ worked diligently with legislators and their staff to develop key sections of SBX7-1. This historic water policy legislation established the Delta Stewardship Council (Council), defined "coequal goals," directed that efforts to satisfy future increases in statewide water demands focus on non-Delta water sources, conservation and water use efficiency and affirmed the Bay-Delta Conservation Plan ("BDCP") as foundational to resolving water management conflicts in the Delta. Based on our members' close association with the legislative history, we are concerned that the promise of this comprehensive legislation is being jeopardized by recent statements and documents emanating from the Council that do not reflect the Legislature's intent with respect to key aspects of the law. SFCWA provides the following analysis as part of our ongoing dialogue with the Council regarding its mission and authority.

THE INTERPLAY OF THE COEQUAL GOALS AND REDUCED RELIANCE ON THE DELTA

Upon reviewing the Council's discussion of its DHCCP EIR "scoping" comments, and notwithstanding our May, 26, 2010 communication to you specifically addressing this issue (attached), we remain troubled that the Council is still misinterpreting the scope and intent of Water Code section 85021, added by SBX7-1. Section 85021 declares state policy "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Our May letter argued for the Council to interpret section 85021 consistent with the plain meaning of the statutory language. Below, we expand on that argument, as all accepted rules of

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¹ SFCWA is a Joint Powers Authority of water contractors that receive water from the State Water Project and the Central Valley Project. Together, SFCWA members serve over 25 million Californians and provide water to irrigate more than 3 million acres of the nation's most productive agricultural lands. SFCWA's mission is to assist its member agencies in assuring a sufficient, reliable and high quality water supply for their customers and maximize the efficient operation and integration of the State Water Project and federal Central Valley Project.

statutory construction not only support our reading of the statute but also refute the often repeated assertion that section 85021 necessitates an absolute reduction of State Water Project (SWP) and federal Central Valley Project (CVP) exports from the south Delta below current levels. The requirement that all statutes be applied in a manner consistent with other goals and policies of the pertinent legislation strengthens our viewpoint as well.

FUNDAMENTALS OF STATUTORY CONSTRUCTION

Statutory construction rules are well established. Their objective is to ascertain and effectuate legislative intent.² In determining legislative intent, the courts first look to the statutory language itself. If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the Legislature's intent.³ However, this "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with the statute's overall purpose.

Moreover, the words of one element of a statute must be construed in context, keeping in mind the overall statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Thus, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and achieve their intended effect.⁴ Even when several separate Codes are involved regarding a particular policy goal, they must be regarded as blending into each other and forming a "virtual" single statute. Accordingly, they must be read together and construed as to give effect, when possible, to all the provisions thereof.⁵

Applying these rules to Water Code section 85021, the Council must first look to the statutory language itself. Specifically, there are two key modifiers to section 85021's general statement that reliance on the Delta should be reduced that are often omitted from conversations regarding its meaning. They are: (1) "future"; and (2) "through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." [Emphasis added.] These modifiers make it clear that the water which is being conveyed through and diverted from the Delta to serve *existing* beneficial uses was not intended to be impacted by this provision. Instead, the statute is directed towards future increases in "water supply needs" and a "statewide investment strategy" to meet them without focusing on the Delta. Any other interpretation would impute to the Legislature intent to strip millions of Californians of the water supplies on which they now rely in complete disregard of the co-equal goals.

Applying the next level of statutory construction and examining how section 85021 fits with the legislation's other provisions, it becomes even clearer that altering current SWP/CVP operations was not the Legislature's intent. The very first section of SBX7-1, which amends Public Resources Code section 29072, sets out the Legislature's fundamental goal -- to ensure that all future efforts to fix the Delta "[a]chieve the two coequal goals of providing a more

² *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468

³ *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735

⁴ *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Moore v. Panish* (1982) 32 Cal.3d 535, 541

⁵ *Mejia v. Reed* (2003) 31 Cal.4th 657, 663

reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” The term “coequal goals” is used fourteen times in the legislation. One of those fourteen instances requires the Council’s Delta Plan to further the coequal goals (Section 85300(a)) and another allows any person to appeal to the Council if implementation of a proposed covered action may “have a significant adverse impact on the achievement of one or both of the coequal goals.” (Section 85225.10(a)) Fostering achievement of the coequal goals is a, if not the, primary purpose of the Council’s activities.

Asserting that SBX7-1 requires the further reduction of water supplies currently available to SWP and CVP contractors would eviscerate one of the coequal goals (“providing a more reliable water supply for California”), and thus ignoring the clear contrary legislative directive. It would exacerbate the current unstable reliability of imported water supplies in SFCWA member agencies’ service areas. In addition, trying to insert development of a response to Section 85021 into the BDCP/DHCCP EIR/EIS as a concomitant focus of analysis and a parallel project purpose is unnecessary, impractical and inconsistent with the timely achievement of the coequal goals.

THE COUNCIL AND SECTION 85021’S POLICY DIRECTION

The standard approach to statutory interpretation also demonstrates that SBX7-1 did not create a power or duty in the Council with respect to implementation of Section 85021. First, Section 85057.5(b)(1) provides that state regulatory actions are not “covered activities” for purposes of Council jurisdiction. Modifying the Delta diversion rights of the SWP and CVP can only be accomplished by the State Water Resources Control Board pursuant to its regulatory authority over water rights. Second, Section 85057.5(b)(2) states that operation of the SWP and CVP are not covered activities subject to the Council’s review and appellate authority. Finally, Section 85031(d) specifically disclaims any legislative intent to interfere with or impact substantive protections related to water rights. All of these sections demonstrate that the policy statement found in Section 85021, and the statewide investment program to meet future water demands to which it refers, is a distinct and separate program outside the purview of the Council’s authorities. However, the Council can and should play an important role in monitoring progress toward the achievement of Section 85021’s policy goal through activities implemented outside the BDCP/DHCCP process.

THE BDCP AS AN ELEMENT OF THE DELTA PLAN

Water Code section 85320(e) directs the Council to make the BDCP an element of the Delta Plan if the Department of Fish and Game (DFG) makes certain findings. The exact language is:

If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. § 1531 et seq.), the council shall incorporate the BDCP into the Delta Plan.

This language clearly establishes that the Legislature granted DFG the primary authority to determine if the BDCP meets the statutory standards for inclusion in the Delta Plan. The Council, however, has been accorded an appellate role if a third party questions DFG's determination that the BDCP meets the requirements of Section 85320. The last sentence of subsection (e) states, rather opaquely: "The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council." The Council is also required to hold one hearing before incorporating the BDCP into the Delta Plan (Water Code section 85320(d)).

While SBX7-1 is silent as to the scope of the Council's review if an appeal is filed, the legislation does state in Section 85322:

This chapter does not amend, or create any additional legal obligation or cause of action under, Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code [the NCCP Act] or Division 13 (commencing with Section 21000) of the Public Resources Code [CEQA].

Thus, it is at least clear that the Council's required hearing and its appeal authority cannot be used to require more from the BDCP than is required under these governing environmental laws. However, because SBX7-1 is silent on the appeal process and the scope of review if an appeal is lodged pursuant to section 85320(e), analogies to other laws should be used to address this lack of legislative guidance.

THE BDCP AS AN HCP

Starting with the straightest forward of Section 85320(e)'s required elements, holding a hearing or processing an appeal on the question of whether the federal fish agencies have approved the BDCP as a habitat conservation plan pursuant to the federal ESA, would be a meaningless act. From a federal supremacy viewpoint, the federal fisheries agencies have the exclusive authority to determine whether the BDCP constitutes an HCP under the applicable federal laws they administer. The issuance of the HCP and its associated take authority by those federal agencies will be conclusive on all parties as to whether the BDCP has met that condition of Water Code section 85320(e).

THE BDCP'S COMPLIANCE WITH CEQA

With respect to CEQA and the DHCCP EIR, as noted above, Section 85322 clearly states that otherwise applicable CEQA requirements are not modified by Sections 85320 and 85321. Thus, the determinations DFG will make are (a) whether all of the topics listed in Water Code section 85320(b)(2)(A) through (G) have been included in the DHCCP EIR and (b) have those topics been adequately addressed within the EIR as required by CEQA and its Guidelines. In making this second determination, DFG will be acting as a responsible agency for the DHCCP EIR, and will have, prior to the time it approves the BDCP as an NCCP, affirmatively, or by operation of law if it fails to timely challenge the EIR, determined that the EIR complies with CEQA's requirements. Public Resources Code section 21167.3, in particular, brings about this result. It states:

(a) If an action or proceeding alleging that an environmental impact report or a negative declaration does not comply with the provisions of this division is commenced during the period described in subdivision (b) or (c) of Section 21167, and

if an injunction or stay is issued prohibiting the project from being carried out or approved pending final determination of the issue of such compliance, *responsible agencies shall assume that the environmental impact report or the negative declaration for the project does comply with the provisions of this division and shall issue a conditional approval or disapproval of such project according to the timetable for agency action in Article 5 (commencing with Section 65950) of Chapter 4.5 of Division 1 of Title 7 of the Government Code.* A conditional approval shall constitute permission to proceed with a project when and only when such action or proceeding results in a final determination that the environmental impact report or negative declaration does comply with the provisions of this division.

(b) In the event that an action or proceeding is commenced as described in subdivision (a) but no injunction or similar relief is sought and granted, *responsible agencies shall assume that the environmental impact report or negative declaration for the project does comply with the provisions of this division and shall approve or disapprove the project according to the timetable for agency action in Article 5 (commencing with Section 65950) of Chapter 4.5 of Division 1 of Title 7 of the Government Code.* Such approval shall constitute permission to proceed with the project at the applicant's risk pending final determination of such action or proceeding.

(Italics added.)

Fundamentally, this provision instructs agencies that will be taking actions related to a project that is the subject of an EIR to treat that EIR as adequate until a court has ruled to the contrary. Because the Council is such an agency for purposes of the DHCCP EIR (Water Code section 85320(c)), it is subject to Public Resources Code section 21167.3's mandates. Thus, an appeal contending the DHCCP EIR is inadequate under CEQA would not be within the Council's jurisdiction to decide.⁶ That task is left to the courts and the Council will be constrained by the dictates of Public Resources Code section 21167.3. Further, the full body of law cannot be interpreted to allow a disgruntled individual or entity to evade the Public Resources Code's mandatory procedures for challenging the adequacy of an EIR (including its 30-day statute of limitations) by filing an appeal with the council -- particularly in the case of the DHCCP EIR where, with probable certainty, that would result in parallel proceedings, one before the Council and one in the courts, on the same legal and factual issues.

We are aware that some have suggested that the Council could make a determination, in response to an appeal, that the DHCCP EIR is inadequate and not be in violation of Public Resources Code sections 21167(a) and (b). We are, quite frankly, stunned by an assertion that the Council could act extra-judicially to declare the DHCCP EIR inadequate when that EIR was before a court on the same issue and still be in compliance with Sections 21167(a) and (b).

⁶ See May 20, 2010 Memo from Tara Mueller to Chris Steven, General Counsel, Delta Stewardship Council, where (at pages 9 and 10), the Attorney General's office recognizes that the Council is acting as a responsible agency when it decides an appeal and that responsible agencies must either accept the lead agencies' EIR or challenge it in court within thirty days of the date that the lead agency files its notice of determination.

Would that same argument be made if a court had ruled the EIR adequate? The law is very clear in this area. State and local agencies that act on projects for which they are not lead agencies “shall assume” that the EIR is adequate unless they have judicially challenged the EIR themselves. The fact that a contrary assumption would not “invalidate the EIR” (See May 20, 2010 Attorney General’s Memo, at page 10.) is irrelevant if the effect of the contrary assumption is to impact the ability of the subject project to proceed.

THE BDCP AS AN NCCP

As the starting point for this analysis, it is fundamental that DFG has been designated by the Legislature as the entity empowered to protect the fish and wildlife resources of the State. (Fish and Game Code section 711.7(a): “The fish and wildlife resources are held in trust for the people of the state by and through the department.” See, also, Section 1000 relating to the Department’s obligation to carry out the research needed to ensure the conservation and protection of fish and wildlife.) DFG is the State agency with the greatest expertise and authority over the resources intended to be protected through the BDCP.

The NCCP Act, in particular Fish and Game Code sections 2810, 2815 and 2820, requires DFG, before deciding whether to enter into an NCCP agreement, to make many highly technical judgments based on the existence of “substantial evidence” which have been informed by a lengthy, exhaustive public process. (See Fish and Game Code section 2820(a).) For the BDCP, the Planning Agreement’s structure and process were approved only after DFG and all interested parties were satisfied that they met all the NCCP Act’s procedural requirements. Consequently, the decisions made by DFG regarding satisfaction of NCCP must be given great deference by the Council.

A consistent string of appellate court decisions hold that judicial appeals from DFG actions mandate such deference, and there is no reason to believe that the Legislature intended to deviate from that approach when it granted the Council authority to hear an appeal from DFG’s NCCP determination under Water Code section 85320. Equally important, it is clear that issuance of an incidental take permit pursuant to Fish and Game Code section 2835 (which will be an integral element of the BDCP) is an adjudicatory action subject to challenge only by administrative mandamus under Code of Civil Procedure section 1094.5. Thus, in any judicial review of a DFG NCCP determination, the abuse of discretion standard would be applied.

In *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 516, the California Supreme Court described the role of appellate bodies in appeals from adjudicatory decisions as follows:

Administrative agency decisions in which discretion is exercised may generally be challenged by a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal. Rptr. 836, 522 P.2d 12] (*Topanga*), we considered the meaning of subdivision (b) of that statute, defining “‘abuse of discretion’ to include instances in which the administrative order or decision ‘is not supported by the findings, or the findings are not supported by the evidence’ ” and subdivision (c), wherein “ ‘abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.’ ”

In addition, the decisions in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 674, and *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336, make clear that review of administrative decisions should accord substantial deference to the agency. The administrative determinations are presumed correct, and all doubts should be resolved in favor of the administrative determination. These concepts are based on the well understood premise that the burden on appeal to establish error is on the parties who challenge the administrative decision.

It bears emphasizing here that cases such as *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection*, (2004) 123 Cal.App.4th 1331, 1351, stand for the proposition that when environmental assessments involve complex scientific questions requiring a high level of technical expertise (such as is the case with the BDCP), and absent a showing of arbitrary action, appellate bodies leave the conclusions to the informed discretion of the agency.

SFCWA believes that these cases and, in particular, the fact that any appeal to the Council related to the NCCP Act will by definition involve an adjudicatory decision (granting incidental take authority) that is within the exclusive jurisdiction of DFG, lead to only one possible conclusion. Any such appeal should be limited to the question of whether DFG's decision to enter into the NCCP agreement and grant incidental take authority was an "abuse of discretion" as defined by the California Supreme Court.

Finally, the SFCWA does not believe that the subject legislation can be properly interpreted to grant groups or individuals that are dissatisfied with the NCCP and its associated take authorization the ability to choose either an appeal to the courts with a deferential "abuse of discretion" standard of review or to the Council with an asserted "de novo" standard of review. This would be a particularly difficult conclusion to reach when there is no evidence that the Legislature has determined that the Council is better equipped or has more expertise than DFG to make the types of technical, scientific, and policy decisions that the Legislature comprehensively delegated to DFG when it passed the NCCP Act in 1991. Thus, the scope of review upon an appeal to the Council should be no different than would be accorded to a plaintiff/petitioner in the courts.

We appreciate your consideration of the content of this letter and look forward to further discussion with the Council as it develops its Delta Plan.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron M. Buck", with a stylized, flowing script.

Byron M. Buck
Executive Director

Attachment



State & Federal Contractors Water Agency

1121 L Street, Suite 802, Sacramento, CA 95814

July 19, 2010

Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Re: General Comments, Second Draft Interim Plan

Dear Chairman Isenberg and Council Members:

SFCWA* appreciates the opportunity to provide the following initial general comments in response to the July 14, 2010 Second Draft Interim Plan (IP). We will follow-up with more detailed and comprehensive comments after the Council's July 23rd discussion.

Overall, this Second Draft is an improvement over the First Draft because it provides some of the detail commenters requested on clarifying the Council's role going forward. However, there still remain some issues that suffer from not having benefited from such refinement. While further revisions to the specific language of the draft are necessary, we remain especially concerned with the IP's seeking to reach well beyond what it needs to as an *interim* plan while at the same time failing to satisfy the clear legislative mandate that the Council "develop an interim plan that includes recommendations for early actions, projects, and programs." [Delta Reform Act (Act), Section 85084. Emphasis added.]

The document's repeated statement that the IP is intended to provide a *framework* for early actions and the corollary on page v (lines 5-6) that the IP "will outline processes the Council will use to develop its recommendations for early actions, projects and programs" are not consistent with section 85084's direction that the IP include early actions, projects and programs. Action, not process, was the legislation's expectation.

We urge the Council to give strong direction to staff to make the IP an *action* plan focused on near-term activities that: (a) are not already being pursued by other state and/or federal entities under existing authorities; (b) can provide immediate support to the achievement of the coequal goals; and, (c) reserves most of the Council's administrative processes to developed as part of the Delta Plan to allow significantly more public engagement than can or will result in the next month. Consistent with the Council's discussion in

* SFCWA is a Joint Powers Authority of water contractors that receive water from the State Water Project and the Central Valley Project. Together, SFCWA members serve over 25 million Californians and provide water to irrigate more than 3 million acres of the nation's most productive agricultural lands. SFCWA's mission is to assist its member agencies in assuring a sufficient, reliable and high quality water supply for their customers and maximize the efficient operation and integration of the State Water Project and federal Central Valley Project.

Directors

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Contractors
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June, you should strive to provide immediate “value-added” content in identifying *actions, projects and programs* that can and should get underway as soon as possible.

The Council could provide such “value added” by recommending that efforts to address “other stressors” in the Delta system be intensified well beyond current lackluster or non-existent approaches. For example, the Council could recommend to the Fish and Game Commission (FGC), consistent with recent correspondence to the FGC from the National Marine Fisheries Service, that the FGC move immediately to revise its regulations related to limits on the striped bass fishery as a partial means to address non-native predation on native species of concern. In this vein, we also encourage the Council to contact the office of the President’s Council on Environmental Quality which has recently undertaken an initiative to ensure the federal agencies are organized to effectively address “other stressor” problems relative to the Delta. If necessary, SFCWA can provide contact information to your staff.

The description of the “Delta water flows” tool, as part of the IP’s seven “Analytical Tools for Council Action”, needs to be significantly revised. The IP’s description references the flow criteria to be developed by the SWRCB this summer and those to be recommended by the Department of Fish and Game (DFG) before the end of the year. These “flow criteria” are identified as a “tool” to help the Council as part of the “framework” development of the IP. Considering these flow criteria, which do not reflect a legally required balancing among beneficial uses (including meeting the water supply reliability component of the coequal goals), would be improper as a “tool” because these criteria are simply informative and will not equate to the actual flow objectives to be adopted by the SWRCB through a water quality planning proceeding balancing competing beneficial uses of water. It is these objectives that ultimately will shape the water management regime within which the Delta Plan will be implemented. Before a revised water quality control plan is adopted, the Council should limit itself to utilizing the current regulatory regime of the Board’s water quality control plan, including conditions imposed by the Biological Opinions for the State Water Project (SWP) and the federal Central Valley Project (CVP), or as they may be modified, as the “tool” to inform its deliberations when appropriate. The issue of “flow criteria” is not a “core responsibility” of the Council. It is an issue that will inform the Council’s deliberations, but the Council itself does not have a deliberative role related to their development. Delta flows and water management regulation are within the purview of the SWRCB.

On page 28, line 33 appropriately mentions “additional information will be added” over time, including “results” from the BDCP. However, the statement that the SWRCB and DFG flows “will be one of the early considerations of Delta water flow” it is unclear who is doing the “considering”. Is it contemplated that it will be the Council or some other entity[ies]? If the Council is doing the “considering”, the draft needs to explicitly set forth why, for what purpose, and under what authority the Council is to be either involved in the development of flow criteria and/or how it views its role in relation to their development and implementation by the SWRCB.

The clarification provided in the Second Draft IP with respect to the Council’s seeking to develop “Indicators of Progress” in meeting future water supply needs rather than asserting a role in establishing or developing standards related to water conservation etc. is appreciated and we believe appropriate. Still, the statement on page 40, lines 10-11 that links measuring “statewide [water] diversions” to tracking progress in meeting the policy charge of section 85021 should be made more explicit that the assessment of “statewide diversions” would be intended to establish a baseline multi-year average of SWP/CVP water project deliveries as contemplated by the BDCP into the future rather than a present-day snapshot of “statewide diversions”.

While we will provide more editorial and textual comments and suggestions later, there is one such item we wanted to bring to your attention now.

On page 1, lines 24-25 (as well as a similar reference on page 4, line 42), the Delta is identified as “the source of drinking water for nearly two-thirds of the state’s population”. As we noted in our comments on the First

Draft Interim Plan, this is inconsistent with how state water law defines sources of water, as well as the permits for many diversions based on those rights. For the majority of pertinent diversions, the “Delta” is not the “source” of these waters. Rather, most of the water is diverted under permit upstream in the Sierra Nevada, stored and subsequently released into the Sacramento River system where it flows into and through the Delta and subsequently re-diverted by other facilities. To describe both direct diversions from the Delta and permitted appropriations upstream, we suggest, as an alternative: “Nearly two-thirds of the state’s population relies on the Delta watershed for all or part of its drinking water.” Additionally, for the same reasons as outlined above, the use of “its flows” on line 25 is misleading and should not be used.

Finally, as a procedural matter, if the Council intends to adopt a final IP at its August meeting, we respectfully request that the 3rd Draft IP be provided to the public at least two weeks prior to the Council’s meeting so detailed comments may be communicated to the Council for timely consideration prior to the meeting rather than having to present them solely at the meeting itself.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron M. Buck", with a long, sweeping horizontal line extending to the right.

Byron M. Buck
Executive Director